In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77 - 1266

ERNEST N. MORIAL, LUKE FONTANA, CARL GALMON, RUSSELL J. HENDERSON, and CHRISTINE B. VALTEAU,

Petitioners

versus

JUDICIARY COMMISSION OF THE STATE OF LOUISIANA, CLEVELAND C. BURTON, JAMES H. DRURY, SIDNEY B. FLYNN, JUDGE EARL E. VERON, CHARLES H. HECK, JUDGE PAUL B. LANDRY, JR., JUDGE S. SANFORD LEVY, EDWARD W. STAGG, as members of the Judiciary Commission of the State of Louisiana; JOE SANDERS, FRANK W. SUMMERS, ALBERT TATE, JR., JOHN A. DIXON, JR., WALTER F. MARCUS, PASCAL CALOGERO, JAMES L. DENNIS, as Justices of the Supreme Court of Louisiana; EDWIN W. EDWARDS, in his capacity as Governor, State of Louisiana; WILLIAM J. GUSTE, JR., in his capacity as Attorney General, State of Louisiana; PAUL J. HARDY, in his capacity as Secretary of State, State of Louisiana,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Pursuant to Rule 24 of the Rules of the Supreme Court of

the United States, the respondents herein hereby file a brief in opposition to Petition for Writ of Certiorari filed on March 13, 1977. Petitioners seek review of the judgment of the United States Court of Appeals entered on December 13, 1977.[1] The respondents are the Judiciary Commission of the State of Louisiana, a constitutionally created body charged with the duty of administering the Judicial Branch of the State of Louisiana, the members of the Supreme Court of Louisiana, and the Governor, Attorney General and Secretary of State of the State of Louisiana.

STATEMENT OF THE CASE

In addition to petitioner's statement, it should be noted that when several months had elapsed after oral argument before a three judge panel of the Fifth Circuit in June, 1977, respondents by motion sought to have this matter heard by the Fifth Circuit Court en banc. The Court so ordered, and then, acting en banc, stayed the decision of the District Court. At that time petitioners sought to have this Court vacate the stay order, which request was denied.[2] Following the resignation of petitioner Morial from his judgeship and his election to the office he sought, the Fifth Circuit, after authorizing and receiving supplemental briefs from petitioners and respondents, rendered the decision of which petitioners complain. That opinion, in which thirteen of the fourteen members of the Court concurred, was handed down on December 13, 1977.

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1. See *Morial v.Judiciary Commission of the State of Louisiana,* 565 F.2d 295 (5th Cir. 1977)

2. *Morial v. Judiciary Commission of Louisiana,* 98 S.Ct. 443 (1977).

REASON FOR DENYING THE WRIT OF CERTIORARI

THE FIFTH CIRCUIT ACTING EN BANC HAS DETERMINED A QUESTION OF FEDERAL LAW PURSUANT TO AND IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT WHICH HAVE DETERMINED THE SAME ISSUE

Petitioners have relied upon two reasons for contending that the writ should be granted: 1) That this is a case of first impression, and 2) That this case was wrongly decided by the Fifth Circuit, en banc.

As shown by the citations set forth herein, this is not a case of first impression, but rather, one in which there has been consistent adherence to the same constitutional doctrine formulated over thirty years ago. Furthermore, that consistent constitutional doctrine has been correctly interpreted and applied to this case by the Court below.

The issues involved in the exercise of political activities by public employees have been thoroughly reviewed. This Court has repeatedly held that there is no absolute right to be a candidate for public office, and that statutory restrictions upon qualification requirements imposed in the public interest are not, in instances such as here, subject to strict scrutiny for any constitutional deficiencies.

United Public Workers of America v. Mitchell,[3] upheld the constitutionality of the Hatch Act holding that the First Amendment rights of the complaining parties were not invaded, reasoning:

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3. 330 U.S. 75 (1947).

> "Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes. The requirements of residence and age must be met. The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery."[4]

The District Court in rendering its decision stated that *Mitchell* ". . . has been drained of much of its vitality."[5] In making such a pronouncement, the District Court was obviously unaware of the subsequent holding of this Court in *United States Civil Service Commission v. National Association of Letter Carriers.*[6] In *Letter Carriers* this Court held:

> "We unhesitatingly reaffirm the Mitchell holding that Congress had, and has, the power to prevent Mr. Poole and others like him from holding a party office, working at the polls and acting as party paymaster for other party workers. An Act of Congress going no further would in our view unquestionably be valid. *So would it be if, in plain and understandable language, the statute forbade activities such as . . . becoming a partisan candidate for, or campaigning for, an elective public office;* . . . Our judgment is that neither the First Amendment nor any other provision of the

4. 330 U.S. 95.

5. *Morial v. Judiciary Commission of the State of Louisiana,* 438 F. Supp. 599, 610 (E.D. La. 1977) *reversed* 565 F.2d 295 (5th Cir. 1977).

6. 413 U.S. 548 (1973).

> Constitution invalidates a law barring this kind of partisan political conduct by federal employees."[7] (Emphasis ours)

Broadrick v. Oklahoma,[8] decided the same day as *Letter Carriers* and also not considered by the District Court, herein ., specifically upheld the validity of the Oklahoma Civil Service Law similar to the Hatch Act forbidding civil service employees from becoming candidates for public office.[9] The Fifth Circuit, sitting en banc, exhaustively analyzed *Mitchell, Letter Carriers* and *Broadrick* in the context of the particular candidacy restriction present in this case.[10] Moreover, other Circuits and Three-Judge Courts have employed similar First Amendment analysis to that used by this Court in those

7. 413 U.S. 556.

8. 413 U.S. 601 (1973) In reviewing the Oklahoma statute the Court held:

> ". . .there is no question that §818 is valid at least insofar as it forbids classified employees from . . . becoming. . . candidates for any paid public office. 413 U.S. 616.

Moreover, the *Broadrick* holding noted the subtle, but nevertheless substantial difference between speech and conduct:

> "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the Statutes plainly legitimate sweep." 413 U.S. 615.

9. 413 U.S. 615.

10. See 565 F.2d 299-306.

decisions, as well as by the Fifth Circuit in this case.[11]

Petitioners, in the Courts below, also alleged that the Canon and Statute at issue, violate the equal protection clause of the Fourteenth Amendment.

Several leading cases, have established that the basic principles governing interpretation of the equal protection clause of the Fourteenth Amendment are:

1. The law need not apply equally to all persons;[12]

2. That all persons similarly situated must be treated alike;[13]

3. That a law is not invalidated because it might have gone farther than it did or because it might not bring about the result it tends to produce;[14] and

10. See 565 F.2d 299-306.

11. See *Magill v. Lynch*, 560 F.2d 22 (1st Cir. 1977); *Wilson v. Moore*, 346 F.Supp. 634 (N.D. W.Va. 1972, Three Judge Court) *Stack v. Adams*, 315 F.Supp. 1295 (N.D. Fla. 1970, Three Judge Court) *Deeb v. Adams* 315 F.Supp. 1299 (N.D. Fla. 1970) *Waide v. Waller*, 402 F. Supp. 922 (N.D. Miss. 1975, Three Judge Court) In rendering its decision, the District Court heavily relied upon *Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973) and *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971). *Mancuso* was determined prior to *Letter Carriers* and *Broadrick*, and in *Magill v. Lynch, supra*, the First Circuit noted that fact and disapproved of the *Mancuso* holding. *Hobbs* was authored by Judge Goldberg, the author of the Fifth Circuit's opinion in this case, who properly distinguished *Hobbs* both factually and legally, from the case presented here. See 565 F.2d 306.

12. *Rinaldi v. Yeager*, 384 U.S. 305, (1966).

13. *Loving v. Virginia*, 388 U.S. 1, (1967).

14. *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, (1966); *Roschen v. Ward*, 279 U.S. 337, (1929).

4. Due process does not authorize courts to hold laws unconstitutional when they believe the legislature has acted unwisely.[15]

A critical determination of whether there has been a deprivation of Equal Protection of the law is often dependent upon whether or not the classification involves a fundamental right. Only where fundamental rights are involved, such as prohibition of voting, discrimination against minorities and curtailment of the freedom of speech,[16] must the challenged classification meet strict scrutiny by the Courts and in these cases, your Honors have enunciated the rule that a state must show a compelling interest in the classification. However, where no fundamental right exists[17] the classification need only be rational *and the burden is on those challenging the classification to show that it has no rational purpose.* A showing that there might be a better way to achieve the legislative end is not enough; the challenged classification *must be proven irrational.* Not a scintilla of evidence to so indicate was introduced here.

The equal protection analysis employed by this Court in cases involving candidacy restrictions is substantially different from that urged by petitioners herein. *Bullock v. Carter*,[18] dealing with exorbitant filing fees, noted that this

15. *Seagram & Sons, Inc. v. Hostetter*, supra; *Ferguson v. Skrupa*, 372 U.S. 726, (1963).

16. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, (1966) (Voting); *Loving v. Virginia, supra*, fn. 13 (Racial Discrimination); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (First Amendment Rights).

17. See *Dandridge v. Williams*, 397 U.S. 471, (1971).

18. 405 U.S. 134 (1972).

Court had "not heretofore attached such fundamental status to candidacy to invoke a rigorous standard of review." Accordingly, the existence of barriers to candidacy "does not of itself compel close scrutiny." Before undertaking any close scrutiny, the Court has required that there be a "realisitic" examination of the particular restriction involved. After making a realistic examination of Texas candidacy laws that required the payment of exorbitant filing fees in order to obtain ballot access, this Court noted that some of the litigants were "unable" to pay the high fees, and were thus arbitrarily eliminated from candidacy on the basis of affluence. Thus non-affluent candidates and their non-affluent supporters were unconstitutionally barred from participating in the political process. That situation does not exist here.

"Realistically," none of the facts present in *Bullock* are applicable in this case. It is undisputed that following the en banc order of the Fifth Circuit staying the injunction issued by the District Court, Judge Morial resigned his office, ran for, and subsequently was elected Mayor of New Orleans. In sum, despite the operation of the Canon, Judge Morial was able to seek public office and his followers were able to support him.

This "realistic" distinction between the facts of *Bullock* and the facts of his case and their bearing upon Fourteenth Amendment rights are also underscored by this Court's opinion in *Rosario v. Rockefeller* [19]. Plaintiffs therein relied upon *Bullock* for their assertion that a state election law that prohibited persons not registered before a fall general election from voting in the next spring's primary was unconstitutional. This Court rejected that contention, holding:

19. 410 U.S. 752 (1974).

> "We cannot accept the petitioners' contention. None of the cases on which they rely is apposite to the situation here. *In each of those cases, the State totally denied the electoral franchise to a particular class of residents*, and there was no way in which the members of that class could have made themselves eligible to vote.***
>
> "Section 186 of New York's Election Law, however, is quite different. *It did not absolutely disenfranchise the class to which the petitioners belong . . .*" [20]

In the context of an equal protection challenge to an employment classification, this Court in *Massachusetts Bd. of Retirements v. Murgia*[21] held that:

> This Court's decisions give no support to the proposition that a right of governmental employment per se is fundamental. See San Antonio Independent School District v. Rodriguez, supra; Lindsey v. Normet, 405 US 56, 73, 31 L.Ed 2d 36, 92 S.Ct. 862 (1972); Dandridge v. Williams, supra, at 485, 25 L.Ed 2d 491, 90 S.Ct. 1153. Accordingly, we have expressly stated that a standard less than strict scrutiny "has consistently been applied to state legislation restricting the availability of employment opportunities." [22]

20. 410 U.S. 757.

21. 96 S.Ct. 2562 (1976).

22. 96 S.Ct. 2566.

Similarly, Circuit Courts and Three Judge panels have thoroughly considered Fourteenth Amendment considerations in upholding the constitutionality of certain "resign-to-run" laws. [23]

The Canon at issue here is a precise, narrowly drawn standard of judicial conduct for seeking public office. It rests upon sound reasoning recognized by many states and the Federal Judiciary. Its scope and intent are plain. It does not prohibit all candidacies for all types of public office since specific exceptions are found within it. Moreover, unlike the lower echelon civil servants considered in *Mitchell, Letter Carriers* and *Broadrick*, the Judiciary is a separate branch of state and federal government for which it is imperative that public trust and confidence be maintained.[24] This requires that there be elimination of even an *appearance* of vulnerability to corruption and conflicts of interest. It not only precludes the entry of members of the judiciary into ongoing campaigns but serves to mitigate the possible adverse effects that might result where unsuccessful candidates return to the bench. For example, a judge, defeated in a strenuous campaign may well have had to express unequivocal views on many diverse issues, and upon his return to the bench be so committed that his expected impartiality would be forever suspect.

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23. *Manson v. Edwards*, 482 F.2d 1076 (6th Cir. 1973), *Wilson v. Moore, supra, Stack v. Adams, supra, Deeb v. Adams, supra, Waide v. Waller, supra.*

24. Even in dissent to *Mitchell*, Justice Douglas pointed out that restrictions on decision making or policy making employees are more justifiable than restrictions on other employees with dissimilar functions. 330 U.S. 120-26.

Moreover, the challenged Canon is not a new or novel idea in the American Judicial Process. The Code of Conduct for United States Judges, adopted by the Judicial Conference of the United States in 1973, provides in Canon 7A(2) that "a judge should resign his office when he becomes a candidate either in a primary or in a general election for any office." As set forth in Appendix I to the opinion of the Fifth Circuit, 43 states have the same or similar Canon to that challenged in this case. Surely the Federal and State Judiciaries were not unmindful of the First and Fourteenth Amendments to the Constitution in formulating their Codes of Judicial Conduct. What the Federal and State Judiciaries are mindful of in the formulation of this Canon, is the unique position of the Judiciary in our society. The Courts must rely upon the confidence and trust of the citizenry in order to attain compliance with their orders. The rights and conduct of members of the judiciary cannot merely be measured according to the standards imposed for other officials, since the Judiciary is required to sit in judgment of other public officials. *United States v. Nixon*.[25] It is the reliance upon public trust rather than popular will that so often distinguishes judges from other officials, since Courts of law are often the last resort for the least powerful and most oppressed.

For the reasons set forth herein, it is respectfully submitted that this case does not measure up to the considerations set forth in Rule 19 of this Court, and that, accordingly, Certiorari should be denied.

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25. 418 U.S. 683 (1974).

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CERTIFICATE

I hereby certify that, pursuant to the rules of this Court, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served on Trevor G. Bryan and William J. Jefferson, One Shell Square, New Orleans, Louisiana 70139,by posting same, properly addressed, and postage prepaid, this day of April, 1978.

Original signed:
M. TRUMAN WOODWARD, JR.

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